88-1498

Supreme Court, U.S.
FILED
MAR 2 1989
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CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1988

BOX OFFICE, INC., a Missouri Corporation, and DAVID JOHN HECKLER,

Petitioners,

v.

STATE OF MISSOURI, ex rel., WILLIAM L. WEBSTER, Attorney General,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Whether petitioners have a right protected by the First and Fourteenth Amendments to the Constitution to conduct the particular charitable fundraising solicitation involved in this case.

2. Whether Missouri's Merchandizing Practices Act, Mo. Rev. Stat. § 404.020(1), on its face and as construed and applied denies petitioners freedom of speech and press and due process of law in violation of the First and Fourteenth Amendments to the Constitution and subjects petitioners to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution.

3. Whether the Missouri Supreme Court's denial of petitioners' petition for writ of prohibition is final within the meaning of 28 U.S.C. § 1259.

LIST OF PARTIES

In addition to the parties named in the caption, the Vietnam Veterans Leadership Program has an interest in the outcome of the litigation.

Petitioner Box Office, Inc. has a parent company, North American Telemarketing Corporation, a California corporation. Petitioner Box Office, Inc. has no subsidiary, or affiliate, to list pursuant to Rule 28.1.

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No. _____

In The

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October Term, 1988

BOX OFFICE, INC., a Missouri Corporation,
and DAVID JOHN HECKLER,

Petitioners,

v.

STATE OF MISSOURI, ex rel.,
WILLIAM L. WEBSTER, Attorney General,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners Box Office, Inc., and David John Heckler respectfully pray that a writ of certiorari issued to review the order of the Supreme Court of Missouri denying petitioners' petition for writ of prohibition, filed February 14, 1989.

OPINIONS BELOW

The order of the Circuit Court of the County of St. Louis, Missouri, filed November 2, 1988, denying petitioners' motion to dismiss in the cause, styled *State of*

Missouri ex rel. William L. Webster, Attorney General v. David John Heckler, dba the Dajeck Company and Box Office, Inc., is unreported and appears as Appendix A. The order of the Missouri Court of Appeals, Eastern District filed December 15, 1988, denying petitioners' petition for writ of prohibition is unreported and appears as Appendix B. The order of the Missouri Supreme Court dated February 14, 1989, denying petitioners' petition for writ of prohibition is unreported and appears as Appendix C.

JURISDICTION

Respondent, the Attorney General of Missouri, filed an action against petitioners asserting that a particular charitable fundraising campaign on behalf of the Vietnam Veterans Leadership Program, a not-for-profit organization, constitutes misrepresentations or fraudulent omissions of material facts in violation of the Merchandizing Practices Act, Mo. Rev. Stat. § 407.020(1) (Vernon Supp. 1988). The Attorney General sought an injunction restraining petitioners from making the particular solicitation and seeking draconian monetary relief, including but not limited to $1,000 for each telephone call made by petitioners in the fundraising campaign.

Petitioners, relying on *Riley v. National Federation of the Blind*, 108 S. Ct. 2667 (1988); *Secretary of State of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984); and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) made a motion in the Circuit

Court to dismiss the action, alleging that their communication was protected by the First and Fourteenth Amendments. When the Circuit Court denied the motion they filed a petition for a writ of prohibition in the Missouri Court of Appeals, Eastern District, asserting that their communication was protected by the First and Fourteenth Amendments. By order dated December 15, 1988 the said petition was denied. Petitioners then filed a petition for writ of prohibition in the Missouri Supreme Court again claiming that their speech was protected by the First and Fourteenth Amendments. On February 14, 1989, the Missouri Supreme Court denied the petition.

The Missouri Supreme Court was required to grant the petition for writ of prohibition because applying the clear and convincing evidentiary standard mandated by the First Amendment, a jury could find only that petitioner's speech is constitutionally protected. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2415 (1986). Accordingly, the Missouri Supreme Court's decision is final within the meaning of 28 U.S.C. § 1257 and the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *Sappenfield v. Indiana*, No. 87-614 February 21, 1989; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975).

PERTINENT CONSTITUTIONAL PROVISION AND STATUTES

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech.

2. The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall . . . deprive any person of . . . liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Missouri's Merchandizing Practices Act, Mo. Rev. Stat. § 407.020(1) (Vernon Supp. 1988) provides in relevant part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with . . . the solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the State of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the . . . solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the State of Missouri of the fact that the Attorney General has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

STATEMENT OF THE CASE

On November 5, 1987, petitioner Box Office, Inc. entered into a written agreement with the Vietnam Veterans Leadership Program to conduct a charitable fundraising solicitation on behalf of the organization. Petitioner David John Heckler dba "The Dajeck Company" worked on the campaign as an independent contractor. The undisputed record shows that Vietnam Veterans leadership Program is a non-profit organization; that it has filed a certificate of incorporation as a nonprofit corporation with the Secretary of State of Missouri; that due to a lack of available funds the organization staff was cut from 8 to 2 in recent years; and that because of the relatively small size of the organization it is difficult to raise the funds necessary to achieve its goals, without the assistance of a professional fundraiser.

The organization entered into the contract with petitioners to raise the funds needed to function effectively. To comply with the provisions of Missouri's Charitable Solicitations Law, the organization has filed a registration statement with the attorney general of the State of Missouri.

Petitioners' campaign on behalf of the Vietnam Veterans Leadership Program is basically the same as two previous campaigns they had conducted for the organization: a telephone solicitation requesting people to purchase tickets for an annual variety show hosted by the organization for the area's special and less fortunate children. The organization received more than $17,000.00 from each of the two prior campaigns. As a result of these campaigns the organization became better known and

some individuals became active volunteers for the group. Without petitioners help the organization would be severely hampered in its ability to carry out its functions and to attract volunteers.

The variety show campaign is the organization's most important fundraising and organizational event. The executive director of the organization is familiar with the solicitation made on its behalf and has attended the previous variety shows it hosted. He found both the solicitation and the show appropriate for the organization.

The telephone solicitation respondent attacks goes as follows:

> "Hello, Mr. and Mrs. ___, this is (solicitor's name) calling for the Vietnam Veteran's Leadership Program. How are you doing this evening? Great. (Respond accordingly) Glad to hear it. The reason for my calling, Mr. ___, is that the Veterans are hosting The Annual Variety Show for the area's special and less fortunate children and we have a real easy way for you to help. What we do is mail to you the ticket and all you have to do is return it along with your check and the veterans will see that the ticket gets out to one of the children's organizations on your behalf. So we're hoping we can count on you to sponsor the children as your guests this year, okay? . . . you can sponsor 21 children for $79.29 or 14 children for $52.86 . . . Our basic and most popular ticket sponsors seven children for $26.43. If you could help with that ticket it would be that many less children that we have to worry about leaving behind. Could we count on you for this support?
>
> . . . Okay, we'll mail your ticket and brochure tonight, when you receive it in the mail, please take a few moments to make out your check for ___ payable

> to the Vietnam Veterans Leadership Program and send it back because we have a lot of preparations to make and we cannot wait until we receive your check. Will you do tha[t] for me Mr. and Mrs.___ Once again on behalf of the children and the Vietnam Veterans Leadership Program, thanks.
>
> Show date, June 30, 1988. Times: 2:00, 4:30 and 7:00. Machinist's Hall, 11365 St. Charles Rock Road, Bridgeton.

On or about December 7, 1988, respondent filed the action herein to restrain petitioners from making the aforesaid communication and seeking a judgment ordering petitioner to pay to the State of Missouri a civil penalty of $1,000 for each telephone call made by petitioner, in addition to the penalties.

Petitioners filed a motion in the Circuit Court to dismiss contending that the solicitation made on behalf of Vietnam Veterans Leadership Program is constitutionally protected and that Missouri's Merchandizing Practices Act, as applied to them, violates the First and Fourteenth Amendments. Petitioners demonstrated in detail that the Court's decisions in *Riley, Joseph H. Munson,* and *Village of Schaumburg* fully protect the charitable solicitation at bar. Nevertheless, on November 2, 1988, the Circuit Court denied petitioners' motion to dismiss. Petitioners' petitions for a writ of prohibition filed with the Missouri Court of Appeals, Eastern District, and subsequently with the Missouri Supreme Court were both denied.

REASONS FOR GRANTING THE WRIT

1. Petitioners' Charitable Solicitation is Protected by the First and Fourteenth Amendments.

A. Petitioners' solicitation on behalf of the Vietnam Veterans Leadership Program, taken as a whole, constitutes "fully protected expression." *Riley v. National Federation of the Blind, supra,* 108 S. Ct. at 2677. Respondent's claim that petitioners' speech is not protected stems from its belief that petitioners should not say they are "calling for the Vietnam Veterans Leadership Program," but should instead say they are calling on behalf of petitioners. *Riley,* however made clear that government may not substitute its judgment as to how best to speak for that of speakers and listeners. *Id.* at 2674-75. The Court explicitly held this "settled rule" is fully as applicable to professional fundraisers' campaigns for charity as it is to other forms of protected speech. *Id.* at 2675. This autonomy for speakers to frame their messages as they, not the government, best see fit is central to the First Amendment. Because freedom of expression needs breathing space to survive "government may regulate in the area only with narrow specificity." *NAACP v. Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963); *see Village of Schaumburg v. Citizens for a Better Environment, supra,* 444 U.S. at 637. The Court has recognized that erroneous statement is inevitable in open discussion, and that it too "must be protected." *New York Times Co. v. Sullivan,* 376 U.S. 254, 271 (1964).

The Attorney General's misunderstanding of *Riley* is reflected in the complaints first allegation of a statutory violation. It reads:

> A. Defendants contacted Missouri residents stating that Defendants were "calling for the Vietnam Veterans Leadership Program. . . ."
>
> B. In actuality, the solicitors were employed by and were agents of Box Office, Inc. and David Heckler d/b/a/ The Dajeck Company, and were calling on behalf of those organizations.

This allegation can mean either or both of two things: (1) it was a material falsehood for petitioners to say that they were "calling for" the Vietnam Veterans leadership program; (2) it was a material omission for solicitors not to say in each telephone contact that they "were employed by and were agents of" petitioners. *Riley* conclusively establishes that neither of these theories can prevail.

Riley underscores that theory (1) is invalid. When a professional fundraiser calls on behalf of a charity it clearly is "calling for" that charity. *See Riley*, 108 S. Ct. at 2676 n.8 ("Fining the fundraiser based upon its speech for the charity has an obvious and direct relation to the charity's speech.").

Riley also demonstrates that theory (2) cannot stand. While the Court suggested in dictum in a footnote that a state might be able to "require a fundraiser to disclose unambiguously his or her professional status," 108 S. Ct. at 2679 n.11, it did not for a minute suggest that, independent of any statutory requirement, a state could penalize a fundraiser for not making such a statement. In the absence of a statutory requirement the state cannot support its assertion that the omission of this information,

and similar information[1] removes petitioners' speech from the protection of the First Amendment. Indeed, Justice Scalia, concurring, stated that in his opinion even this requirement could not be imposed. *Id.* at 2681.

B. In cases raising First Amendment issues the Court has repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion in the field of free expression." *New York Times Co. v. Sullivan, supra,* 376 U.S. at 284-286; *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485 (1984). When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case by case adjudication is of special importance. "This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Bose Corp., supra,* 466 U.S. at 503. The Court has consistently emphasized that the First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole. *Id.* at 503-504.

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[1] The petition for writ of prohibition filed with the Missouri Supreme Court demonstrated that all of the respondent's allegations against petitioners were of like character.

Petitioners understand, of course, that there are categories of communication and certain special utterances to which the broad protection of the First Amendment does not extend because they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth, that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplisky v. New Hampshire,* 315 U.S. 568, 572 (1942).

Fraud like libel, fighting words, incitement to riot, obscenity, and child pornography have been held to be outside the scope of freedom of speech. "In such cases, the Court has regularly conducted an independent review of the record, both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptable narrow limits in an effort to insure that protected expression will not be inhibited." *Bose Corp., supra,* at 505. This is so because providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. Ibid.

The requirement that the Court determine for itself whether a particular communication is protected or unprotected "is a rule of federal constitutional law," and "reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp.* at 510-511.

In *Bose Corp.* the Court, as expositor of the Constitution, independently examined the challenged speech to determine whether it crossed the constitutional threshold that bars the entry of a libel judgment that is not supported by clear and convincing proof of actual malice. The Court observed that the statement before it "represents the sort of inaccuracy that is commonplace in the forum of robust debate," adding that "erroneous statement is inevitable in free debate and . . . must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive." *Id.* at 513 (inner quotes and citation omitted).

These principles apply to this case. The Missouri Supreme Court had before it the full text of petitioners' speech together with respondent's claim that the speech was unprotected. Accordingly, there was no need for a trial since the Missouri Supreme Court had before it all that was necessary to find that petitioners' speech is constitutionally protected. *See Anderson v. Liberty Lobby, Inc., supra,* 106 S. Ct. at 2514.

2. Missouri's Merchandizing Practices Act on its Face and as Construed and Applied Denies Petitioners Freedom of Speech and Press and Due Process of Law in Violation of the First and Fourteenth Amendments and Subjects Petitioners to Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments.

On its face Missouri's Merchandizing Practices Act applies to speech to which plenary protection attaches, to wit, "the solicitation of any funds for any charitable purpose." The Act makes it unlawful to employ any

"deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of any material fact in connection with . . . the solicitation of any funds for any charitable purpose. . . ." None of the terms describing the prohibited activities are defined in the Act, and because the Act has been interpreted to be more restrictive than common law principles of fraud, there are no guidelines to be found in the case law interpreting the Act. *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W. 2nd 368 (Mo. App. 1973).

When speech is at stake, the First Amendment "demands a greater degree of specificity" than would otherwise be required under the due process clause of the Fourteenth Amendment. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). For these instances not only implicate the question of fair notice of what is permitted and what is forbidden, but pose the danger that protected speech will, contrary to the values protected by the First Amendment, be cut off. "Those . . . sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. . . ." *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964) (footnote omitted).

The indefinite language of the Act has resulted in the State construing the Act to apply to petitioners' constitutionally protected speech. The Act is therefore on its face and as construed violative of the First and Fourteenth Amendments guaranteeing freedom of speech. It also subjects petitioners to cruel and unusual punishment.

The Attorney General requested the Court to enjoin petitioners from engaging in the particular fundraising campaign set forth ante at 6-7. Additionally the Attorney General prayed that petitioners be ordered to pay to the State of Missouri a civil penalty of $1,000 for each fundraising call made by petitioners; that petitioners be ordered to pay to the State an amount to adequately serve as restitution to compensate any person who has suffered ascertainable loss as a result of any of the communications of petitioners; that petitioners be ordered to pay an additional ten percent of the restitution amount to be paid into the State Treasury to the credit of the Merchandizing Practices Revolving Fund; and that petitioners be ordered to pay to the State all expenses incurred by the State in the investigation and prosecution of the case, including reasonable attorneys fees.

Because the Act as construed subjects petitioners to potential damages running into the millions of dollars, the Act as construed necessarily chills speech "in direct contravention of the First Amendment's dictates." *See Munson, supra* 467 at 969; *New York Times, Co. v. Sullivan, supra* 376 U.S. at 279; *Riley, supra* at 2676. Additionally, the Act as construed violates the Eighth Amendment because it constitutes cruel and unusual punishment.

3. The Missouri Supreme Court's Denial of Petitioners' Petition for Writ of Prohibition is Final Within the Meaning of 28 U.S.C. § 1259.

In *Cox Broadcasting Corporation v. Cohn, supra,* the father of a deceased rape victim brought an action against a broadcasting company to recover damages for invasion of the father's right of privacy, which invasion allegedly

occurred when the company in violation of a Georgia statute, identified the victim during a television coverage of the trial of the rapists. The Trial Court upheld the statute and granted the father's motion for summary judgment. The Georgia Supreme Court agreed that the statute was not in conflict with the First Amendment, but reversed the grant of summary judgment, and remanded the case for further proceedings. This Court reached the merits and reversed, although the judgment was not final.

The Court concluded that it had jurisdiction to review the Georgia Supreme Court's judgment rejecting the challenge under the First and Fourteenth Amendments because the judgment was "plainly final on the federal issue and is not subject to further review in the state courts." 420 U.S. at 485. The Court explained that the broadcasting company would be liable for damages if the elements of the state cause of action were proved, and that while the company might prevail at trial on non-federal grounds, "there should be no trial at all," if the Georgia Supreme Court erroneously upheld the statute. The Court stated that delaying final decision of the First Amendment claim until after trial would leave unanswered an important question of freedom of the press under the First Amendment," an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." *Id.* at 486, 95 S. Ct. at 1041 (quoting *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n.6 (1974).

The Court stated:

> [I]f we now hold that the First and Fourteenth Amendments bars civil liability for broadcasting the

> victim's name, this litigation ends. Given these factors – that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt – we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

Id. at 487. *See also, Sappenfield v. Indiana, supra* ("Adjudicating the proper scope of First Amendment Protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule.")

In light of *Sappenfield* and *Cox Broadcasting Corp.*, the Court has jurisdiction to review the judgment of the Missouri Supreme Court, rejecting petitioners' challenge under the First and Fourteenth Amendments to the state law authorizing injunctive and damage suits against a professional fundraiser for a charitable organization for making a solicitation that is protected under *Riley, Munson* and *Schaumburg*.

CONCLUSION

For the aforesaid reason, the petition for writ of certiorari should be granted.

Dated: February 28, 1989

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APPENDIX A

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

21st JUDICIAL CIRCUIT

State of Missouri PLAINTIFF VS David J. Heckler et al DEFENDANT	DATE Nov 2, 1988 CASE NUMBER 570822 TEAM/DIVISION A

Joint Motion to Dismiss of Defendants called, heard and overruled.

APPENDIX B

(SEAL)

In the Missouri Court of Appeals
Eastern District

STATE OF MISSOURI, EX REL. BOX OFFICE, INCORPORATED, and DAVID JOHN HECKLER, d/b/a THE DAJECK COMPANY, Relators,	)	No. 55825
	)	Writ from the Circuit Court of St. Louis County, No. 570822
vs.	)	
THE HONORABLE ROBERT L. CAMPBELL, Respondent.	)	

O R D E R

Relators have filed a Petition for Writ of Prohibition along with Suggestions in Support and Exhibits. Respondent has filed Suggestions in Opposition.

Being duly advised in the premises, the Court *DENIES* Relators' Petition.

SO ORDERED.

DATED: December 15th, 1988

/s/ Harold Satz
Harold L. Satz,
Presiding Judge
Writ Division III
Missouri Court of
Appeals
Eastern District

cc: Hon. Robert L. Campbell
Leonard Frankel
Michael H. Musich
Donald Wolff
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APPENDIX C

CORRECTED MANDATE

No. 71276

In the Supreme Court of Missouri

January *Session*, 1989

State ex rel. Box Office, Incorporated and David John Heckler, d/b/a The Dajeck Company, Relators,

vs. PROHIBITION

Honorable Robert L. Campbell, Judge, Circuit Court, St. Louis County, Respondent.

Now at this day, on consideration of the petition for a writ of prohibition *herein to the said respondent ___, it is ordered by the court here that the said petition be, and the same is hereby denied.*

Respondent's request for attorney's fees denied.

STATE OF MISSOURI – Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January *Session thereof, 1989, and on the* 14th *day of* February *1989, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson this 17th *day of* February 1989.

/s/ Thomas F. Simon *Clerk*

_____ *D.C.*

Supreme Court, U.S.
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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

Although Respondent is generally satisfied with the Petitioners' Presentation of the Questions for Review, typographical errors have apparently occurred:

A. In Petitioners' question number 2, Section 407.020(1) was apparently intended instead of "Section 404.020(1)," the corrected question reading:

> 2. Whether Missouri's Merchandising Practices Act, Mo. Rev. Stat. Section 407.020(1), on its face and as construed and applied denies petitioners freedom of speech and press and due process of law in violation of the First and Fourteenth Amendments to the Constitution and subjects petitioners to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution.

B. In Petitioners' question number 3, 28 U.S.C. 1257 was apparently intended instead of "28 U.S.C. Section 1259," the corrected question reading:

> 3. Whether the Missouri Supreme Court's denial of petitioners' petition for writ of prohibition is final within the meaning of 28 U.S.C. Section 1257.

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ADDITIONAL PERTINENT STATUTES

In addition to the Constitutional Provisions and Statutes presented by Petitioners, this case also involves the following:

1. Charitable Solicitations, Missouri Revised Statutes, 1986:

407.469. Disclosure of fund-raising costs and use of professional fundraiser.

2. Whenever a solicitation of funds on behalf of a charitable organization is undertaken by a professional fundraiser, the professional fundraiser shall disclose that fact to prospective contributors.

2. Charitable Solicitations, Missouri Revised Statutes, 1986:

407.472.

2. Whenever it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any method, use, act, or practice declared to be unlawful by [section 407.469], he may bring an action pursuant to section 407.100 for an injunction prohibiting such person from continuing such methods, uses, acts, or practices, or engaging therein, or doing anything in furtherance thereof. In any action brought by the attorney general under this subsection all of the provisions of sections 407.100 to 407.140 shall apply thereto.

3. Merchandising Practices Act, Missouri Revised Statutes, 1986:

407.100. Injunction – temporary restraining orders – receivers – restitution, when – civil penalty – venue. – 1. Whenever it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be

unlawful by this chapter, he may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.

2. In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds or accounts if the court finds that funds or property may be hidden or removed from this state or that such orders or injunctions are otherwise necessary. . . .

4. The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered any ascertainable loss, including, but not limited to, any moneys or property, real or personal, which may have been acquired by means of any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter. It shall be the duty of the attorney general to distribute such funds to those persons injured. . . .

6. The court may award to the state a civil penalty of not more than one thousand dollars per violation;

4. Federal Trade Commission Act, 15 U.S.C. 45(a)(1):

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

5. 28 U.S.C. 1257; State Courts; Appeal; Certiorari:

Section 1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treatis or laws of the United States,

6. Merchandise Practices Act, Missouri Revised Statutes, 1986:

Section 407.020(1). The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with *the sale or advertisement of any merchandise in trade or commerce or* the solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the State of Missouri, is declared to be an unlawful practice. (Emphasis added)

7. Section 407.453, Missouri Revised Statutes, 1986:

407.453. Definitions. – . . .
(2) "Charitable purpose", any purpose which promotes, or purports to promote, directly or indirectly, the well-being of the public at large or any number of persons, whether such well-being is ingeneral or limited to certain activities, endeavors or projects;

STATEMENT OF THE CASE

The Petitioners' Statement of the Case correctly indicates that Respondent, the State of Missouri, filed an action in the St. Louis County Circuit Court seeking to enjoin defendants from soliciting residents of the State, in

an allegedly fraudulent manner. The State's petition found fault with the Petitioners' telephone solicitation script (Petition for Writ of Certiorari, p. 6), rebuttals (Respondent's Appendix D, hereinafter R.A., D) and numerous additional aspects of Petitioners' conduct (see R.A., A for excerpts from the State's petition). The action was brought on December 22, 1987 by the State of Missouri. The State's investigation included undercover employment obtained by two State employees. Respondent's Appendix E contains excerpts from a training session conducted by Petitioner Heckler and recorded by a state investigator. Petitioner Heckler announced to his employees that "We are not a charitable organization." (R.A., E).

Also incorporated by reference as part of the State's initial pleading was the contract by which Petitioners agreed to conduct solicitations on behalf of various 3rd parties, including the Vietnam Veterans Leadership Program (VVLP). Portions of this contract have been attached hereto (R.A., C). The contract provides that a 3rd party (e.g., the VVLP) would receive less than 20% of the total amount contributed by persons solicited. The contract also indicates that the Petitioners' enterprise is "non-charitable" and "conducted for profit."

The Statement of the Case of Petitioners is peppered with "facts" which are not of record in any court. The Respondent does not admit that the VVLP is having problems raising money; that the VVLP received any proceeds as a result of Petitioners' solicitations; that the variety show was "annual", or that it was for "special and less fortunate children"; that the solicitors raised funds for the VVLP; that the solicitation conducted by Petitioners was a "charitable" solicitation; or that the "executive director" of the VVLP "found both the solicitation

and the show appropriate." In fact, results of the investigation conducted by the State of Missouri conflict with many of the Petitioners' assertions. Such matters of "fact" are not of record, not undisputed, and better left to the finder of fact at time of trial.

Petitioners claim that after filing their motion to dismiss, they "demonstrated in detail" that their solicitation was justified pursuant to various decisions of this Court. The presence of this controversy before this Court suggests otherwise. Petitioners have omitted a very relevant portion of § 407.020, RSMo 1986. See the emphasized section in Additional Pertinent Statutes at page 3. At this point in the litigation, Respondent is not prepared to stipulate that Petitioners were promoting, or even purporting to promote, a charitable endeavor.

Petitioners fail to acknowledge the existence of Section 407.469, RSMo 1986; the State has alleged that Petitioners failed to disclose their professional fundraiser status to persons solicited, in violation of that statute. Also absent from the Petition for Writ of Certiorari is acknowledgment of the existence of Section 407.100 RSMo 1986, under which the State seeks relief (see *Additional Pertinent Statutes*, for the text of the listed statutes). At the trial court level, the State has requested injunctive relief, restitution, civil penalties and other appropriate orders.

The Petitioners filed a motion to dismiss, which was denied by the trial court on November 2, 1988. On that same date, Petitioners (defendants) were ordered to answer long-pending discovery. Petitioners responded by petitioning for Writs to the Missouri Court of Appeals, the Missouri Supreme Court, and, presently, the United States Supreme Court.

SUMMARY OF ARGUMENT

1. The decisions of the Missouri Trial and Appellate Courts are not in conflict with any decision of this Court, i.e., the Respondent's cause of action is allowed, *and encouraged,* by *Riley v. National Federation of the Blind of N.C.*, 108 S.Ct. 2667 (1988).

   a. False and misleading speech has never been protected by the First Amendment to the United States Constitution.

   b. State fraud laws, such as Section 407.020, RSMo 1986, serve as the appropriate and constitutional means of deterring and punishing fraudulent and deceitful solicitations.

   c. Section 407.469, RSMo 1986, constitutionally requires a solicitor to disclose its professional fundraising status to prospective contributors, as clearly stated in *Riley*.

2. The denial of the Petition for Writ of Prohibition by the Missouri Supreme Court did not constitute a "final judgment or decree" according to the letter or spirit of 28 U.S.C. 1257. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

3. Respondent has a right to proceed to trial, and to submit this case to the trier of fact, in order to determine whether Petitioners' solicitation program is fraudulent, deceitful or misleading.

ARGUMENT – REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Petitioners cannot properly invoke the First and Fourteenth Amendments in defending this action.

This Court has never given any constitutional protection to false or misleading speech; four United States Supreme Court cases make this proposition abundantly clear:

> "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."

Gertz v. Welch, 418 U.S. 323, 340 (1974)

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake."

VA. ST. BD. of Pharm. v. VA. CIT. CONS. COUNCIL, 425 U.S. 748, 771 (1976).

> "The First Amendment's concern for commercial speech is based on the informational function of advertising. . . . Consequently, there can be no constitutional objection to the repression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . . or commercial speech related to illegal activity."

Central Hudson Gas v. Public Service Comm'n. of N.Y., 447 U.S. 557, 563 (1980).

> "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading

> or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely."

In re RMJ, 455 U.S. 191, 203 (1982).

Petitioners spend considerable time and effort trying to convince this Court that the Vietnam Veterans Leadership Program is a legitimate, benevolent entity. Such an effort misses the point. No alleged charity, no matter how deserving or desperate for money, is entitled to defraud or deceive members of the public in order to obtain donations.

The action by the State of Missouri (Respondent) was filed in response to large scale solicitation efforts by Petitioners. The State has alleged numerous types of violations of the Missouri Merchandising Practices Act, Chapter 407, RSMo 1986 (R.A., A).

The State of Missouri has, in its extensive pleading, alleged that the solicitation of Petitioners is fraudulent, deceitful and misleading. The troublesome nature of the Petitioners' solicitation (reprinted in the Petition for Writ of Certiorari, pp. 6-7) is put into focus when directly compared to the following composite of the solicitation, constructed by reference to the State's allegations:

> Hello Mr. & Mrs. ___. This is (solicitor name). I am employed by The Dajeck Company, and I work as a professional fundraiser.
>
> I am not a veteran; nor am I a volunteer for the Veterans. However, the Vietnam Veterans Leadership Program has agreed to allow us to use its name in this solicitation. Of the money you are about to give me, the Veterans will receive less than 20 cents of

each dollar. More than 80% of the money you might contribute goes to the benefit of various for-profit entities.

The VVLP is also allowing us to use its name in connection with a show which will occur on June 30, 1988 at a local establishment having a seating capacity of 1400. The small travelling group of for-profit performers and all other show expenses will be paid for by you and other persons we solicit. The preparations for this "show" are minimal; the entertainers simply travel the North American Telemarketing circuit across the country, giving "Annual" shows continually, several times a year in many cities. Although we hope to sell $4,000,000.00 worth of tickets for this St. Louis show (at slightly less than $4.00 per ticket), we will be surprised if more than a few hundred persons attend.

If you choose to buy tickets, and if you return the tickets to us, chances are virtually nil that your tickets will reach any children's organization, much less that they will bring children to our show. To successfully bring "special and less fortunate children" to outside events, transportation and supervision are required for the children's convenience and safety. We will provide neither.

We are not a "charity" nor do we seek "donations." Our contract with the VVLP provides that this solicitation is part of a profit-generating enterprise, a factor you may want to consider prior to deciding the amount of money you will be sending to us.

Be advised that children do not receive any of the money you give to us. Now, how much money are you willing to send to us today?

A comparison between the two versions of solicitation obviously indicates a great disparity. The state has alleged that the magnitude of the disparity indicates that fraud, deceit, material omissions of fact and misleading

information permeate the version of the pitch admittedly used by Petitioners.

The injustice perpetrated by the Petitioners is best appreciated by looking at the sales pitch as a whole and by putting oneself in the shoes of a consumer receiving such a solicitation at home, over the telephone. Petitioners' polished solicitation succeeds in gaining contributions from some of the people, much of the time; Petitioners wouldn't be in business if it didn't. The State has alleged, in effect, that the Petitioners have systematized their fraud, hiding it among cliches, stock phrases and canned rebuttals.

Fairness requires that the pitch be judged by its broad impact. The damaging effects of the pitch are quite real, and require the intervention of the State. Once informed of the truth, the State alleges that the thousands of Missouri citizens who have given their hard-earned money to Petitioners would undoubtedly wish that their money could have gone, instead, to worthier causes. The State asks only for a chance to prove in the trial court that Petitioners' entire program, including the solicitation, rebuttals (R.A., D) and solicitor training (R.A., E), is undeserving of First Amendment protection, and amounts to a fraud.

II. THE MISSOURI MERCHANDISING PRACTICES ACT, including Sections 407.020 and 407.469, is constitutional, both facially and as applied.

Contrary to suggestions by Petitioners, *Riley v. National Federation of the Blind of N.C.*, 108 S.Ct. 2667

(1988), did not discourage prosecution of fraud by state governments:

> [T]he State may vigorously enforce its anti-fraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements . . .

Riley, 108 S.Ct. at 2679.

Though the *Riley* court did strike part of the N.C. Charitable Solicitations Act, the stricken portions did not resemble the portions of the Missouri Merchandising Practices Act attacked by Petitioners. In fact, the *Riley* Court went out of its way to encourage anti-fraud law enforcement:

> In striking down this portion of the Act, we do not suggest that states must sit idly by and allow their citizens to be defrauded. North Carolina has an anti-fraud law, and we presume that law enforcement officers are ready and able to enforce it.

Riley, 108 S.Ct. at 2676.

The State of Missouri is doing exactly what is suggested by the *Riley* Court. The Merchandising Practices Act *is* Missouri's anti-fraud law. Without its existence and applicability, Missouri consumers would be defenseless against the innumerable con artists who visit every state and the District of Columbia. See also *Village of Schaumberg v. Citizens, Etc.,* 100 S.Ct. 826 (1980):

> "Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."

Village of Schaumberg, at 836.

Without suggesting an alternative remedy to the Missouri Merchandising Practices Act, the Petitioners complain that its language is "indefinite" and that it lacks "guidelines."

Consumer protection statutes, of necessity, must be flexible. In *Federal Trade Commission v. Sperry and Hutchinson Company*, 92 S.Ct. 898 (1972), the United States Supreme Court concluded that Congress had not enumerated a list of specific prohibited acts in the Federal Trade Commission Act because to do so would be useless and would only open the door for inventive deceivers to find loop holes in the FTCA. Therefore, 15 U.S.C. Section 45 (a)(1) *constitutionally* states:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Likewise, the Missouri State Judiciary has spoken with regard to the Merchandising Practices Act:

> The purpose of these statutes is to supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions. In order to give broad scope to the statutory protection and to prevent ease of evasion because of overly meticulous definitions, many of these laws such as the Missouri statute "do not attempt to define deceptive practices or fraud, but merely declare unfair or deceptive acts or practices unlawful", leaving it to the court in each particular instance to declare whether fair dealing had been violated.

State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W. 2d 362, 368 (Mo. App. 1973). See also *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W. 2d 633 (Mo. App. 1988), for the

proposition that Chapter 407 is to be given broad scope to prevent evasion because of overly meticulous definitions.

The State of Missouri has not, could not, and should not draft a statute to specifically prevent the particular types of conduct alleged in its lawsuit against Petitioners. Consequently, the attempts by the Petitioners to hide behind the Constitution of the United States are inappropriate. The unrealistic, over-restrictive, super-technical enforcement scheme which Petitioners apparently seek would serve only to fling open the doors of this State to the undeniably existing hordes of scam technicians.

Petitioners fail to mention Section 407.469(2), RSMo 1986, which requires that they announce their professional fundraiser status:

> "Whenever a solicitation of funds on behalf of a charitable organization is undertaken by a professional fundraiser, the professional fundraiser shall disclose that fact to prospective contributors."

The *Riley* Court gave its stamp of approval to such a requirement:

> The Act, as written, requires the fundraiser to disclose his or her employer's name and address. Arguably, this may not clearly convey to the donor that the solicitor is employed by a for-profit organization, for example, where the employer's name is "Charitable Fundraisers of America". However, nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the

> contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

Riley, 108 S.Ct. at 2679, footnote 11.

Subparagraph 34.D. of the State's petition clearly alleges that Petitioners have failed to abide by the provisions of Section 407.469.2, RSMo 1986. Whether the solicitor is a third-party professional is important to many prospective contributors, who wish to make the most efficient use of their contributions to purportedly benevolent causes. The State is certainly entitled to an opportunity to prove to the trier of fact that Petitioners illegally refused to announce their professional fundraiser status.

As this Court has stated, commercial speech can permissibly be regulated by way of warnings and disclaimers, if necessary, in order to assure its truthfulness:

> There are commonsense differences between speech that does "no more than propose a commercial transaction." . . . and other varieties. . . .[T]he differences . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.
>
> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . .They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.

VA. ST. BD. of Pharm v. VA CIT. CONS. COUNCIL, 425 U.S. 748, fn. 24, 771, (1976). The *Virginia State Board* Court asserted further that the First Amendment "does not

prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely." 425 U.S. at 772.

III. The Missouri Supreme Court Denial of Petitioners' Writ of Prohibition is not a "final judgment or decree." Therefore, the United States Court is without jurisdiction to hear this matter.

Petitioners cite *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) for the proposition that, upon denial of their Writ of Prohibition by the Missouri Supreme Court, a "judgment" became "final." To the contrary, this case does not present a "judgment," much less one that is "final." What the Petitioners have been unsuccessful in pursuing to date were "extraordinary writs"; that characterization itself indicates the non-finality of the federal issues at hand, and the interlocutory nature of the ruling of the Missouri Supreme Court.

The Petitioners cite the very passage of *Cox* which defeats their claim that a "final judgment" has already been rendered (Petition for Writ of Certiorari, p. 15): The Georgia Court judgment "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 485.

The *Cox* court delineated four categories of cases wherein a decision regarding a federal issue was treated as a final judgment for the purposes of 28 U.S.C. Section 1257. In each of these categories, the resolution of the federal issue was, indeed, "conclusive" or "finally

decided" though further proceedings remained to be conducted in the State Courts. *Cox Broadcasting Co.*, 420 U.S. at 479-484.

Certainly, upon this Court's denial of this Petition for Writ of Certiorari, the Petitioners would have every right to a full hearing, at which time they would be allowed to again broach the topics they raise herein. If they were to be unhappy with the judgment rendered by the Missouri trial court, they would obviously have opportunities to appeal to two levels of Missouri Appellate Courts. Then, armed with a legitimate "final judgment," they could properly seek the assistance of this Forum.

Petitioners cite *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) for the proposition that this Court should immediately examine the "whole record" and conclude that there is "no need for a trial" (Petition for Writ of Certiorari, pp. 10, 12). The State is confused by Petitioners' arguments. It is impossible to examine the "whole record" until the case is tried. To further complicate matters, the Petitioners have presented this Court with numerous alleged "facts" not of record in any Court (Petition for Writ of Certiorari, *Statement of the Case*). The *Bose* and *New York Times* Courts admittedly reviewed the "whole record," but such reviews occurred *after* the cases were tried. The State of Missouri deserves the same treatment, i.e., that the "whole record" be developed at trial prior to review by any appellate court. Innumerable questions need to be answered by the trier of fact, especially the question of whether the solicitation conducted by Petitioners was fraudulent, deceitful or misleading. If so,

the speech is not constitutionally protected, and the controversy between Petitioners and Respondent would be entirely within the ambit of the Missouri State Judiciary.

Much work remains to be done in the Missouri Trial Court: Petitioners are under court order to produce answers to Respondent's long-pending discovery. Respondent has also filed a motion to add North American Telemarketing Corporation as a party defendant in this matter. (R.A., B).

CONCLUSION

Petitioners have failed to demonstrate that the Missouri Supreme Court has decided any question of federal law unsettled by this Court, or in conflict with applicable decisions of this Court. Petitioners have also failed to demonstrate the existence of a final judgment or decree. Therefore, the United States Supreme Court lacks jurisdiction to hear this controversy. The Respondent is entitled to an opportunity to prove at trial that Petitioners' solicitation is fraudulent, deceitful and misleading. If the trier of fact were to find in favor of Respondent, Petitioners' speech would not be worthy of Constitutional protection.

Therefore, Respondent respectfully asks that this Court deny the Petition for Writ of Certiorari.

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RESPONDENT'S APPENDIX A

[Excerpts from Respondent's Petition pending at the trial court level]

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, ex rel., WILLIAM L. WEBSTER, Attorney General, Plaintiff,	)	
vs.	)	Cause No. 570822
DAVID JOHN HECKLER, d/b/a THE DAJECK COMPANY, (Serve: 9920 Watson Rd., Suite 209 St. Louis, MO 63126),	)	Team A
and	)	
BOX OFFICE, INCORPORATED, a Missouri corporation, (Serve: Registered Agent: C. T. Corporation 314 North Broadway St. Louis, MO 63102),	)	
Defendants.	)	

APPLICATION FOR TEMPORARY RESTRAINING ORDER, PETITION FOR PRELIMINARY AND PERMANENT INJUNCTION AND OTHER COURT ORDERS

. . . .

27. C. Further, Defendants' sales pitch misleads consumers into thinking that the ticket proceeds will in some manner go to the benefit of various children's groups. When, in fact, no children's groups will financially benefit from the purchase of tickets.

. . . .

29. A. Defendants, through their agents and employees, told Missouri residents "Well, our basic and most popular tickets sponsor seven children for $26.43. If you could help with that ticket it would be that many less children that we have to worry about leaving behind."

. . . .

C. There is no likelihood that a donation of $26.43 will result in seven children actually attending the Defendants' "variety show".

. . . .

G. Defendants knew that most tickets sold by Defendants would not be used to attend the show; therefore, Defendants knew that a purchase of $26.43 in tickets would not cause seven children to attend the show.

H. . . . 3. After such deductions, the remaining proceeds will be divided equally between Box Office, Inc., and the Vietnam Veterans Leadership Program, which will therefore receive less than 20% of all payments made by Missouri citizens to Defendants.

4. The enterprise engaged in by Defendants and the Vietnam Veterans Leadership Program is noted to be non-charitable in nature and intent and is being conducted for profit."

. . . .

31. A. Solicitors of Defendants told and continue to tell consumers that "We'll mail your ticket and brochure tonight. When you receive it in the mail please take a few moments to make out your check for ___ payable to the Vietnam Veterans Ledership (sic) Program. Send it back

because we have a lot of preparations to make and we cannot until we receive your check."

B. In actuality, Defendants are creating a false atmosphere of urgency, in that preparations are minimal and do not depend upon the contribution of money by any particular solicitee.

32. A. Defendants instructed their solicitors to inform the public that their program was "approved by the Attorney General".

B. Defendants' program was not and is not "approved" by the Attorney General of Missouri.

. . . .

34. D. By their refusal to disclose that they are professional fund raisers, Defendants are violating and continue to violate Section 407.469.2:

> "Whenever a solicitation of funds on behalf of a charitable organization is undertaken by a professional fund raiser, the professional fundraiser shall disclose that fact to prospective contributors."

35. A. Defendants informed their solicitors that they may be asked where the solicitees' money will go. Defendants have informed their solicitors that "though I (David Heckler) get a percentage of them (the funds), that is not determined until after the show."

B. David Heckler d/b/a The Dajeck Company receives 50% of all funds given to the enterprise, right off the top, and that is set out clearly in the contract as attached to this pleading.

C. Box Office, Inc. receives 10% of the total intake, right off the top, and that is clearly set forth in the contract, as attached.

. . . .

39. In making the above statements and omissions, Defendants mislead the public into thinking that Defendants are engaged in a charitable enterprise, when, in fact, they are not.

RESPONDENT'S APPENDIX B

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, ex rel., WILLIAM L. WEBSTER, ATTORNEY GENERAL, Plaintiff,	)	Cause No. 570822
vs.	)	Team A
DAVID HECKLER, et al., Defendants.	)	Division 7

MOTION TO ADD NORTH AMERICAN TELEMARKETING CORPORATION AS A PARTY, AND TO FILE AMENDED PETITION

Plaintiff states the following in support of its motion:

1. Plaintiff filed this lawsuit on December 28, 1978.

2. In May, 1988, plaintiff served defendants with Requests for Production and Interrogatories.

3. Despite numerous attempts to compel defendants to provide answers to discovery, plaintiff has not yet received such answers to discovery, plaintiff has not yet received such answers.

4. Independent investigation by plaintiff has revealed North American Telemarketing Corporation to be a necessary party to the just resolution of this controversy.

5. Plaintiff attaches its proposed amended petition, and asks the Court to order the addition of defendant North American Telemarketing Corporation. Plaintiff

further requests leave to file the attached amended petition and to serve summons upon North American.

WILLIAM L. WEBSTER
Attorney General
Erich Vieth /s/
Erich Vieth #29850
Assistant Attorney General
111 North 7th St., Suite 903
St. Louis, Missouri 63101
314/444-6816

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 22nd day of February, 1989 to: Leonard J. Frankel, 100 South Brentwood, 5th Floor, Clayton, MO 63105, attorney for Box Office Inc. and to Donald L. Wolff, 8019 Forsyth, Clayton, MO 63105, attorney for David Heckler.

Erich Vieth /s/

RESPONDENT'S APPENDIX C

[Excerpts from Exhibit A of the Respondent's Petition filed with the State trial court. These excerpts are taken from the contract concerning one of the solicitations giving rise to the present controversy.]

BOX OFFICE, INC.

This Agreement made and entered into this 5 day of November , 19___ by and between BOX OFFICE, INC. a Missouri corporation, hereinafter referred to as "First Party", and St. Louis Vietnam hereinafter referred to as "Second Party", said expression to include the respective parties, successors and assigns: Veterans Leadership Program

. . . .

5. The parties hereto acknowledge and agree that this venture or enterprise is non-charitable in nature and intent and is being conducted for profit. It is further agreed that the parties hereto are not general agents of each other, and this contract shall not be construed by the parties hereto or others as being a partnership agreement or one of a charitable nature or intent.

Said campaign director to receive as his fee 50% of the gross collections of said campaign representing his total compensation.

The First Party shall receive 10% of the gross collections of said campaign to cover all of its expenses

. . . .

14. After deduction of the amounts paid to the First Party and the campaign director as set forth in paragraph

5 and of the items in the Budget of Expense, the remainder of the joint account shall remain intact until the appearance of the show at the specified site at the specified time for the first performance. At such time the remaining items of expenses shall be paid and *the profits shared equally between both parties.*

APPENDIX D

[Excerpts from Exhibit D of the Respondent's Petition filed with the State Circuit Court. These are alleged rebuttals utilized by Petitioners as part of one of their solicitation campaigns.]

Missouri State Firefighters, Missouri State Council of Firefighters, evening rebuttals, use two or more of these each call.

90% of sales comes after answering questions or objections using rebuttals.

1. Too much money: Mr. Jones we're not talking about a lot of money, if you think about it it breaks down to about $3.50 a child and you're helping out three causes, the fire fighters, the St. Louis area and the less fortunate children, so can we count on your support this year?

2. Already called: But just started this campaign, maybe you have confused us with another organization. So we can count on your support this year. If you sound concerned where the money goes, your check is made out directly to the Missouri State Firefighters which fully governs the distribution of the funds, so in this way you can be sure that your support will go where it will do the most good, okay?

3. What percentage goes to the firefighters: We don't know that until after the final show preparations have been made. That is why the checks are made to the Missouri State Fire Fighters and deposited directly into their account so we can count on your support?

4. Already have the ticket: Are those the red, white and blue tickets? (if yes) You must have confused us with

another group because our tickets are orange and white, so can we count on you for that $26.43 ticket?

5. Need information: We really can't afford to send literature to everyone who asks, the reason I'm calling is that we can send out literature only to those people who really want to help us. So, can we count on you for that $26.43 ticket?

7. I don't do solicitations over the phone: I understand your concern Mr. ___, but we mail your ticket before you pay and we ask that you pay via check or money order, making it payable to the Missouri State Firefighters. You can also write for deposit only on the back of the check so no one else can use the money, okay?

8. Unemployed, fixed income: I understand Mr. ___, but we get a lot of support from concerned citizens who are in your position. If you think about it, we're not talking about a lot of money, only $26.43 to send to needy children to the show. Okay?

9. Not interested, disgruntled: I'd be surprised if you are at this point, but Missouri State Firefighters are hosting the show.

10. Gave elsewhere: Well, that means that you are concerned about the community, however, this is an event only done once a year. Without your help many of our fire fighters and fire fighting safety programs would suffer.

RESPONDENT'S APPENDIX E

[From Exhibit C of the Plaintiff's Petition, statement made by David Heckler at solicitor training session concerning the Vietnam Veterans Leadership Program, December 10, 1987.]

"We are talking about collecting 4 million in the next 3 or 4 months. We are not playing a game. . . . Use the volume of your voice to sell the tickets. You don't have to know anything to do this job except this 'shit' [referring to the pitch sheet and rebuttals] . . . 95% of the reasons they [consumers] give you, when they give you a reason other than flat out 'no', are bullshit, I swear to God I trap them [consumers] all the time . . . The sponsor doesn't matter, the kids sell the tickets, the sponsor only enhances it . . . We are not a charitable solicitation. That is the fine line of this job . . . Most businessmen I know spend $50.00 on lunch, ask them for it, I swear to god these kids sell the tickets."